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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1197

NOLAN CARTER, JR., Trustee in Bankruptcy, Petitioner,

versus

COMMERCIAL BANK OF MIDDLESBORO, KENTUCKY, - - - - - - Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

JOSEPH L. LENIHAN,
908 West Broadway,
Louisville, Kentucky 40201,

GLENN W. DENHAM,
2121½ Cumberland Avenue,
Middlesboro, Kentucky 40965,
Counsel for Respondent.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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NOLAN CARTER, JR., Trustee in Bankruptcy, *Petitioner*,

v.

COMMERCIAL BANK OF MIDDLESBORO, KENTUCKY, - - - - - - - *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinions below are as stated in the Petition for Writ of Certiorari filed herein, except that the opinion of the Court of Appeals is reported in 418 Fed. 2d 705.

JURISDICTION.

The petitioner has correctly stated the steps for invoking the jurisdiction of the Supreme Court.

QUESTION PRESENTED.

Respondent restates the "Question Presented" because statement of the question in the Petition reflects Petitioner's misunderstanding of the principle involved in this case.

Is a perfected security interest to secure payment of an obligation extinguished by operation of law when, on the due date of the note which is evidence of the obligation, a partial payment of the obligation is accepted and a renewal note is executed which is evidence of the balance due on the obligation?

STATUTE INVOLVED.

Petitioner's statement of the statute involved is accepted.

STATEMENT OF CASE.

Petitioner's statement of the case is acceptable except that in the last paragraph thereof at the top of page 5 of the Petition the statement of the basis of the decision of the Sixth Circuit Court of Appeals in reversing the decision of the United States District Court for the Eastern District of Kentucky is incomplete.

Inasmuch as the Opinion is printed in full in Appendix A to the Petition, and inasmuch as the Opinion is discussed at some length under the heading "Reasons for Granting Writ" it does not appear necessary to set out the basis of the decision in greater detail.

ARGUMENT.

The Decision of the Sixth Circuit, Review of Which Is Sought by the Petition, Does Not Conflict With Berman, Decided by the First Circuit.

In the Petition for Writ of Certiorari under title "Reasons for Granting Writ," point 1 is stated as follows:

> "The Decision Below Conflicts in Principal (sic) With the Decision in the First Circuit Court of Appeals as to the Proper Application of Article 9-204(5) of the Uniform Commercial Code."

This heading and comments thereunder reflect the continuing failure of Counsel for Petitioner to understand the Court's decision in Safe Deposit Bank and Trust Company v. Berman, 393 F. 2d 401 (First Cir. 1968), and the opinion of the Sixth Circuit Court of Appeals reprinted in Appendix A to the Petition.

As is demonstrated by the manner in which the question is presented in the Petition, the concept of Petitioner's Counsel of a security transaction is that the note involved is the thing secured rather than the indebtedness. Being unable to accept the obvious "hornbook law" that a chattel mortgage secures the debt not the evidence of it, Petitioner can never hope to understand what the Circuit Court has held in its Opinion (see Opinion and Judgment of Court of Appeals, Appendix A to Petition for Writ of Certiorari, page 11).

The Sixth Circuit is accused of "avoiding" Berman, *supra,* "* * * by stating it was inapposite, because there had been additional loans made in Berman, *supra,* and not in Cantrill" (Petition, page 5). Yet, in the next sentence Petitioner "grants" that the Sixth Circuit has correctly distinguished Berman on its facts, but says that it has nothing to do with the application of the principal (sic) laid down in Berman. Without explaining why it is true, the Petition contains the bald statement:

> "In light of Berman, and the principal (sic) of law therein established, it is not possible to reconcile the two cases" (Petition, page 6).

There Is No Issue of National Importance.

Under point 2 entitled "Overall National Importance of Issue" the confusion compounds beyond reason. Counsel for Petitioner would have the Court believe that all of the lending institutions in the United States, and legal counsel for these institutions, are confused and searching for the answer to the puzzling question of what to put in a security agreement which will protect the institution when the obligation matures and the debtor cannot pay.

It is apparent that only Counsel for Petitioner is confused, and this confusion results directly from failure to properly analyze either Berman, *supra,* or the Opinion of the Sixth Circuit, a review of which is sought by this Petition.

Beginning with the last grammatical paragraph, on page 6 of the Petition, Petitioner analyzes this Opinion of the Sixth Circuit:

> "The Sixth Circuit held in essence, that even when a new note is taken, with an increase in interest, this does not create a new obligation, and as such is not 'other value.' "

In respect to this point, what the Sixth Circuit held is best stated by the Opinion itself. At page 12 of Appendix A, beginning with the second grammatical paragraph the Court said:

> "Turning to the note, it is clear that the parties to the transaction did not intend that the new note was to extinguish the original obligation for the note specifically recites that it is 'Renewal No. 1 Orig. Amt. $30,310.00.' It also recites the date of the original loan and refers to the collateral for that loan. It is difficult to imagine a clearer case than this. The parties' intention was only to extend the time for payment not to extinguish the obligation.
>
> "The fact that the interest rate was raised from 6% to 7% does not negate this conclusion. See Amlung v. First Nat'l Bank of Louisville, 411 S. W. 2d 465, 467 (Ky., 1967). Commercial certainly did not intend to give up its security. See State Nat'l Bank of Frankfort v. Thompson, 277 Ky. 527, 530 (1938). The Trustee in Bankruptcy can hardly claim there was a novation because he has stipulated:
>
> " '(4) On the 8th day of August, 1967 a payment was made on the original note and a renewal

note was executed by Cantrill Construction Company to the Commercial Bank in the amount of Twenty Thousand Two Hundred Two Dollars ($20,202.00) bearing interest at the rate of seven (7) per cent per annum. There is a balance due from the Bankrupt on account of the above described transaction in the amount of Twenty Thousand Two Hundred Two Dollars ($20,202.00) with interest at seven (7) percent from the 8th day of August, 1967.'

"Since there was no novation, the original obligation remains in full force."

Of all misinterpretations regarding what the Sixth Circuit held in its Opinion, the most obvious is found in the following sentence beginning at the bottom of page 6 of the Petition:

"* * * The Sixth Circuit also held that security agreements did not need to provide for extensions or renewals of pre-existing obligations, and that a security agreement, limited to the note it is given to secure the repayment of, may be extended to subsequent notes by incorporation by reference in the subsequent notes."

Using this platform, constructed upon this misinterpretation of what the Sixth Circuit Opinion held, the sentence following asks the rhetorical question:

"* * * This case simply asks—what is 'other value,' and if Berman is correct . . . and the Sixth Circuit was correct, then how does one advise a client on how he is to secure his loans against future defaults, or renewals or extensions. * * *"

Having constructed a false platform from which to launch this question, Counsel for Petitioner ignores the question but strings together some unrelated sentences meaning nothing.

What the Sixth Circuit did hold in respect to extensions or renewals, and "other value" is found in the last grammatical paragraph on page 15 of Appendix A to the Petition:

> "In the present case there was no 'future advance' as in Berman. No new money was loaned to Cantrill. All that was done was to renew the evidence of the old indebtedness and extend the time of payment. If Berman is to apply, the renewal note would have to come within the concept of 'other value' of § 355.9-204 (5). Had the new note been taken in payment and satisfaction of the indebtedness, then arguably there would have been 'other value.' In other words, a *new obligation* would have been created, just as a distinct obligation was created in Berman by the future advances. Section 355-9-204(5) allows security agreements to cover these future, distinct obligations so long as they are specifically set forth in the agreement. However, as we have discussed, there was no novation in this case. There was, therefore, no new obligation required by § 355.9-204(5) to be set forth in the security agreement. The original obligation remained in full force, and was, of course, covered by the security agreement. It was not necessary for the security agreement to provide for an extension or renewal of the indebtedness."

Thus, since the Berman case, *supra,* in which future advances were made, relates to a security agreement which failed to provide for "future advances," since

there is no requirement that "extensions or renewals" of an obligation be included in a security agreement, and since the Opinion of the Sixth Circuit as quoted in the preceding paragraph clearly explains why the phrase "other value" does not apply to this transaction there is no uncertainty and doubt connected with transactions of this nature which need to be resolved.

Quite the contrary, if it should be determined that, a security transaction which is as clear, uncomplicated and technically correct as this one, is to be declared void on the basis suggested by Counsel for Petitioner, confusion and uncertainty truly would reign supreme in commercial and legal circles.

It has been most difficult to respond to this Petition because no logical argument is advanced to support Petitioner's position. The easiest way for the Court to clearly understand this case is to read the Opinion of the Sixth Circuit and compare it with the Berman case. When this is done there will be no doubt the Petition should be denied.

CONCLUSION.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOSEPH L. LENIHAN,
908 West Broadway,
Louisville, Kentucky 40201,

GLENN W. DENHAM,
2121½ Cumberland Avenue,
Middlesboro, Kentucky, 40965,
Counsel for Respondent.